

No. (2)
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

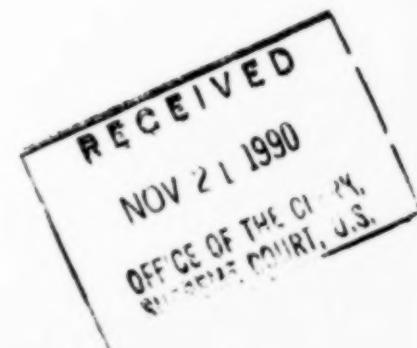
Joseph N. Williams)
v.)
United States of America)

ORIGINAL

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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30 RP

QUESTION PRESENTED

When the Sentencing Commission has determined that arrests not resulting in convictions, and convictions more than 15 years old, should not be considered in determining the defendant's criminal history category, should this Court permit a district judge to use such information in departing upward to a harsher sentence than that called for by the Sentencing Guidelines?

PARTIES

1. United States of America, Plaintiff in the U.S. District Court for the Western District of Wisconsin, Appellee in the Court of Appeals and respondent in this court.
2. Joseph N. Williams, defendant in the district court, appellant in the court of appeals and petitioner here.

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JURISDICTION

The judgment of the United States Court of Appeals for the 7th Circuit, sought to be reviewed by this petition, was entered on August 27, 1990. No rehearing or extensions of time were sought. Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. Sec. 1254 by filing this petition by mail on November 20, 1990 and within 90 days of the judgment of the court of appeals as required by rule 13.1 of this court.

STATUTE INVOLVED

18 U.S.C. Sec. 922 (g) (1) is reproduced here:

Sec. 922

(g) It shall be unlawful for any person -
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

The defendant was indicted in the United States District Court for the Western District of Wisconsin charging that: "having been convicted of a felony did knowingly and unlawfully possess a firearm, a Virginian Dragoon, revolver .44 caliber magnum, having the serial number 0315, which had traveled in and affected interstate commerce. On July 25, 1989 the defendant was found guilty by a jury, after a trial before the Honorable Judge John C. Shabaz in the U.S. District Court for the Western district of Wisconsin. On September 20, 1989, Judge Shabaz entered judgement finding the defendant guilty of 18 USC Sec. 922 (g) (1) Possession of a firearm by a convicted Felon, and was sentenced to be imprisoned for a term of 27 months followed by a three year term of a Supervised Release. Notice of Appeal was timely filed on September 22, 1989. The United States Court of Appeals for the Seventh Circuit affirmed the judgement of the district court on August 27, 1990.

ARGUMENT FOR GRANTING THE WRIT

The district court determined that an upward departure from sentencing guidelines was warranted based upon "reliable information" indicating that the criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct nor the likelihood that the defendant will commit other crimes.

The district court in so departing considered two convictions more than 15 years old which were not counted in the criminal history. The convictions for the unlawful taking of a motor vehicle and forgery were both felonies and although having occurred in 1966 and 1967, respectively, they suggested to the district court that the defendant's career of criminal activity, unless discouraged, will continue. The district court also considered numerous arrests for which the defendant has not been prosecuted. The district court then held that the serious criminal conduct reflected in those arrests, coupled with those convictions more than 15 years old not considered in the guidelines, suggested after a review of all the relevant information, that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, category V. The district court accordingly determined that the defendant should be in category VI, rather than category V.

The Court of Appeals for the 7th Circuit held on review that it was error for the district court to consider the prior arrests of the defendant that had not resulted in convictions because they were not "reliable evidence" that the conduct described in the arrest entries was indicative of a more severe criminal history. The 7th Circuit held in this case and in United States

v Franklin, 902 F.2d 501, 508-09 (7th Cir. 1990) that a sentence may be upheld notwithstanding such error, if there are proper factors that standing alone would justify the departure.

However, the 9th Circuit held in the United States v. Hernandez-Vasquez, 884 F.2d 1314, 1315-16 (9th Cir. 1989) that:

"The guidelines anticipate that departure will be rare. Sentencing Guidelines ch. 1 Para. A, introduction 4(b)... If a court relies on both proper and improper factors the sentence must be vacated and the case remanded." (emphasis supplied)

See also, to a like effect, United States v Zamarripa, No. 89-2145, 1990 U.S. App. Lexis 98251 at 14 (10th Cir. 1989).

There is thus a conflict between the 7th Circuit and the 9th and 10th Circuits as to the use of improper factors in sentencing. The 7th Circuit takes the position notwithstanding improper factors such as "prior arrests not resulting in convictions" in computing a sentence that the sentence may be upheld if there are proper factors standing alone that would justify the sentence.

The 9th and 10th Circuits hold that if a court relies on both proper and improper factors, the sentence must be vacated and the case remanded.

In view of all the above it is accordingly requested that this Court grant certiorari to fashion a proper standard of appellate review in guideline cases, and resolve the conflict between the 7th Circuit and the 9th and 10th Circuit Courts of Appeal as to whether or not a sentence must be vacated if both improper and proper factors are relied upon in sentencing or whether such a sentence may be upheld if there are proper factors standing alone that would justify the imposition of the sentence.

OPINION OF THE COURT OF APPEALS

United States of America v. Joseph N. Williams No. 89-3084

Argued April 19, 1990 - Decided August 27, 1990.

APPENDIX

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: August 27, 1990

BEFORE: Honorable Harlington Wood, Jr., Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Jesse E. Eschbach, Senior Circuit Judge

NO. 89-3084

UNITED STATES OF AMERICA,
Plaintiff - Appellee
v.

JOSEPH N. WILLIAMS,
Defendant - Appellant

Appeal from the United States District Court for the
Western District of Wisconsin
No. 89 CR 47, Judge John C. Shabaz

This cause was heard on the record from the above mentioned
district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this
Court that the judgment of the District Court in this cause appealed
from be, and the same is hereby, AFFIRMED, in accordance with the
opinion of this Court filed this date.

In the

United States Court of Appeals
For the Seventh Circuit

No. 89-3084

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH N. WILLIAMS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Wisconsin.
No. 89 CR 47-8—John C. Shabaz, Judge.

ARGUED APRIL 19, 1990—DECIDED AUGUST 27, 1990

Before WOOD, JR. and RIPPLE, Circuit Judges, and
ESCHBACH, Senior Circuit Judge.

RIPPLE, Circuit Judge. This is a direct appeal from a
federal criminal conviction. After a jury trial, the appellee,
Joseph Williams, was convicted of being a felon in
possession of a firearm in violation of 18 U.S.C. § 922(g)(1).
The district court sentenced him to 27 months imprisonment,
followed by 3 years of supervised release. Mr. Williams
filed a timely appeal. For the following reasons, we affirm the
judgment of the district court.

I
FACTS

Mr. Williams was the subject of an undercover investigation during 1988 and 1989. Paul Harding, an agent with the Bureau of Alcohol, Tobacco & Firearms, met with Mr. Williams on a number of occasions at the bus that Mr. Williams occupied as living quarters. Mr. Williams claimed to Agent Harding that he had no trouble handling a firearm, referred to "his .44," and also described how to manufacture ammunition for a .44 magnum weapon. On April 12, 1989, Agent Harding obtained a search warrant for the bus. The warrant was executed on April 20, 1989. The officers conducting the search discovered a loaded .44 caliber magnum in the lower right hand drawer of a desk located in the bus. Mr. Williams subsequently was indicted for being a felon in possession (on or about April 20, 1989) of a firearm, in violation of 18 U.S.C. § 922(g)(1).

The defendant introduced evidence at trial that the owner of the bus (Henry Yates) was actually the owner of the gun. Yates testified that, during the day on April 19, 1989, he took the gun to an area near the bus and fired at tree stumps. He went into the bus, cleaned the gun, and placed it in the desk while Mr. Williams was not present. He left it there inadvertently and had not removed it by the time the search warrant was executed the next day. Another witness, Phyllis Orlando, testified that she had looked into the drawer the day before the search warrant was executed and did not see a gun.

The government introduced testimony at trial from Agent Harding who said that he met with Mr. Williams over a four month period and that, on January 9, 1989, Mr. Williams told Agent Harding that he had fired .44 magnum guns and that he had no problems firing such guns. On January 18, 1989, Agent Harding again met Mr. Williams at the bus. During this meeting, Mr. Williams told Agent Harding that he could handle .44 magnum guns. Agent Harding testified that the defendant then reached toward

the top drawer of the desk and, before actually opening the drawer, turned to Agent Harding and pretended as if he were pulling a trigger on an imaginary gun. They then went to a nearby van. Mr. Williams pointed out bullet holes in the van and claimed that he had fired his .44 magnum into the van.

Agent Harding met once again with Mr. Williams on February 7, 1989. During their conversation Mr. Williams discussed how the .44 magnum operated. He pointed out a bullet hole in the desk that he claimed was an accidental discharge of the gun. At no point during any of these meetings did Mr. Williams actually show a gun to Agent Harding. However, several individuals testified at trial that they did see Mr. Williams in possession of a gun. One witness, Jonathan Anties, identified a firearm as the one shown to him by Mr. Williams in October 1988. Mr. Anties testified that Mr. Williams removed a .44 magnum from his desk drawer while the two were in Mr. Williams' bus. In addition, Mr. Anties testified that he saw Mr. Williams on 20 to 40 occasions with the firearm in his possession. Other witnesses, including neighbors and friends, testified to seeing Mr. Williams with a .44 magnum firearm during 1988 and 1989.

The jury found Mr. Williams guilty. The district court received the probation office's sentence calculations which indicated a range of 18 to 24 months imprisonment based on an offense level of 9 and a criminal history category of V. The district court departed upward from the guidelines, determining that the criminal history category did not reflect adequately the seriousness of Mr. Williams' past criminality. That particular finding was based, at least in part, on two felony convictions in 1966 and 1967 which were not considered in determining the criminal history category. The district court concluded that the correct criminal history category should be VI and sentenced Mr. Williams to 27 months imprisonment. Mr. Williams filed a timely appeal.

II

ANALYSIS

A. *Sufficiency of the Evidence*

Mr. Williams asserts that the "unimpeached" evidence of his witnesses indicated that Yates owned the firearm and that Yates normally kept the firearm locked in his bedroom. Appellant's Br. at 11. Furthermore, Mr. Williams stresses the story that Yates told at trial: that Yates came into Mr. Williams' bus to use an amateur radio, placed the firearm in a drawer by the radio, and forgot to take the firearm with him when he left. Based on this evidence, Mr. Williams claims that he did not have *knowing* possession of the firearm as required under 18 U.S.C. § 922(g)(1).

A defendant bears a heavy burden when he challenges the sufficiency of evidence. "The test is whether after viewing the evidence in the light most favorable to the government, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Herrero*, 893 F.2d 1512, 1531 (7th Cir.) (quoting *United States v. Pritchard*, 745 F.2d 1112, 1122 (7th Cir. 1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis supplied by *Jackson* court))), *cert. denied*, 110 S. Ct. 2623 (1990). Based on this demanding test, we cannot say that the evidence submitted to the jury made conviction impermissible. The evidence included eyewitness accounts tying Mr. Williams to the firearm and statements made by Mr. Williams to an undercover police officer bragging about owning and firing a .44 magnum. Faced with conflicting stories from a number of witnesses who claimed to see Mr. Williams in possession of the firearm and Mr. Yates' testimony to the contrary, it is quite possible that the jury decided to believe that Mr. Williams possessed the firearm. The evidence supporting such a conclusion is certainly sufficient to support Mr. Williams' conviction under the standard we must apply.

B. *Upward Departure*

According to the application of the Sentencing Guidelines, Mr. Williams was classified with a criminal history category of V. Combined with his offense level of 9, his sentencing range was 18-24 months. The district court determined that the criminal history category did not reflect adequately the seriousness of Mr. Williams' offenses and his propensity for committing additional crimes in the future. The court therefore increased the criminal history category from V to VI, yielding a sentencing range of 21-27 months. We examine the district court's departure from the Sentencing Guidelines "to determine whether it was reasonable in light of the district court's explanations for its departure at the time of sentencing." *United States v. Gaddy*, No. 89-3037, slip op. at 3 (7th Cir. July 26, 1990). We review the grounds stated for departure under the *de novo* standard, but accept factual findings supporting the departure unless clearly erroneous. Finally, we must determine whether the amount of departure was reasonable. *Id.* at 3-4; *United States v. Williams*, 901 F.2d 1394, 1396 (7th Cir. 1990); *see also United States v. Gardner*, No. 89-6289, 1990 U.S. App. Lexis 9887, at *5 (10th Cir. June 18, 1990).

The district court decided to depart because, in its view, the criminal history category did "not adequately set forth the criminal history of this Defendant." R.61 at 305. Mr. Williams claims that the departure was erroneous in two respects: the district court should not have considered two convictions that were more than fifteen years old,¹ and

¹ Guideline § 4A1.2(e)(1) limits inclusion in the calculation of criminal history to felonies that occurred within fifteen years of the commencement of the currently charged offense. However, application note 8 to that section recognizes that this time limit is not immutable: "If the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct . . . , the court may consider this information in determining whether to depart and sentence above the applicable guideline range."

the court improperly counted arrests that did not result in conviction.

1. General principle: Guideline § 4A1.3

Guideline § 4A1.3 allows the district court to depart from the sentence "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct . . ." Some types of information, such as arrest records, may not be considered in departing upward. Beyond what may not be considered, the guidelines provide only partial guidance by setting forth a nonexclusive list of what might be "reliable information." The guidelines direct that, after reviewing the evidence of a defendant's past criminality and propensity for future crime, the district court may "conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines." Guideline § 4A1.3.

2. Convictions more than fifteen years old

The district court took into consideration two felonies—unlawful taking of a motor vehicle and forgery—which were not included in the calculus for determining Mr. Williams' criminal history category because they occurred more than fifteen years prior to the current offense. See Guideline § 4A1.2(e)(1). The guidelines provide two ways for the district court to consider the old convictions for purposes of upward departure. First, application note 8 to § 4A1.2 allows the court to consider older convictions "[i]f the government is able to show that [the] sentence . . . is evidence of similar misconduct" or that the defendant received a "substantial portion of income from criminal livelihood." See *Gardner*, 1990 U.S. App. Lexis 9887 at *7-8; *United States v. De Luna-Trujillo*, 868 F.2d 122,

124-25 (5th Cir. 1989).² The sentences involved in this case are not suited for consideration under this rationale, because the two crimes apparently are nonviolent and thus substantially dissimilar to the current conviction (possession of a firearm).

The second way in which the old convictions might be considered is under section 4A1.3 as "reliable information." Dissimilar criminal conduct occurring more than fifteen years prior to the current offense still may be relevant in determining whether the criminal history category underrepresents the defendant's criminality. Cf. *United States v. Carey*, 898 F.2d 642, 645-46 & 646 n.5 (8th Cir. 1990) (even when record did not reflect whether old burglary convictions were violent crimes or gun-related, district court properly considered them as "reliable information" under § 4A1.3 to increase criminal history category on defendant convicted under 18 U.S.C. § 922(g)). As our colleagues on the Tenth Circuit recently commented, older convictions may "reflect a defendant who has shown himself to be, in reality, a recidivist criminal." *United States v. Jackson*, 903 F.2d 1313, 1318 (10th Cir. 1990) (district court properly referred to, *inter alia*, a twenty-one year old forgery conviction in applying § 4A1.3 to increase criminal history category of defendant convicted of being a felon in possession of ammunition). We conclude that such old convictions may—in appropriate circumstances—be "reliable information" indicating more extensive criminal conduct than otherwise reflected by the criminal history category.

² In a similar case involving possession of a firearm by a felon, the Ninth Circuit determined that the district court correctly increased the criminal history score to account for convictions occurring more than fifteen years prior to the charged crime. The old convictions were for assault with a deadly weapon and assault and battery. "Inasmuch as they show a propensity toward violence and a willingness to use force, these crimes may be viewed as similar to possession of a firearm by a felon." *United States v. Cota-Guerrero*, No. 89-30082, 1990 U.S. App. Lexis 7464 at *5 (9th Cir. July 16, 1990).

Here, the two convictions in question were not the *sole* basis for departure. As we shall discuss more specifically later, the district court considered these convictions along with other aggravating factors that, taken together, required, in the district court's view, an upward departure. We cannot say that consideration of these two convictions as part of an overall assessment of the defendant's criminal background was inappropriate.

3. Previous arrests not resulting in conviction

At the sentencing hearing, the district court referred to the presentence report, which included a short discussion of the defendant's past charged criminal conduct that did not result in conviction, and the defendant's objections to the report. In addition, the Assistant United States Attorney presented the court with a copy of the defendant's arrest record.³

There is no dispute that a district court may not rely solely upon an arrest record as the basis for an upward departure. See *United States v. Cantu-Dominguez*, 898 F.2d 968, 970-71 (5th Cir. 1990); *United States v. Cervantes*, 878 F.2d 50, 55 (2d Cir. 1989); Guideline § 4A1.3. Evidence based solely on police records of the arrest is not sufficient to satisfy the "reliable information" requirement. *United States v. Cota-Guerrero*, No. 89-30082, 1990 U.S. App. Lexis 7464 at *6 (9th Cir. July 16, 1990). Nevertheless, the guidelines allow the district court to go beyond the arrest record itself and to consider whether the underlying facts evidence "prior similar adult conduct not resulting in a criminal conviction." Guideline § 4A1.3(e). Courts have construed this subsection to include charges

³ The arrests included one for attempted rape and one for assault with a dangerous weapon. According to the presentence report, both charges were dismissed because the complaining witness failed to appear. Mr. Williams filed objections to the presentence report claiming that the two charges were each dismissed after the veracity of the complaining witnesses was called into question.

that were dropped when a witness failed to appear, *United States v. Gayou*, 901 F.2d 746, 748 (9th Cir. 1990), charges that were dismissed after the defendant made restitution to the victims, *United States v. Russell*, Nos. 89-6142 & 89-6219, 1990 U.S. App. Lexis 9851 at *12 (10th Cir. June 20, 1990), and admissions by the defendant that he committed non-charged criminal acts, *United States v. Spragins*, 868 F.2d 1541, 1544 (11th Cir. 1989). The focus of our review upon appeal is whether the evidence of prior conduct is sufficiently trustworthy to be considered "reliable information."

The district court in this case specifically articulated the principle that it could *not* base an upward departure solely on the arrest record. However, while relying, at least in part, on the conduct described in the arrest record, it did not state, with any clarity, the factual basis for its reliance. The government notes that two of the arrests—for rape and for assault with a dangerous weapon—are described in the presentence report as having been dismissed because a complaining witness failed to appear. However, even if we assume that this description would be adequate for purposes of consideration under section 4A1.3, the defendant contested the accuracy of the description. The district court never resolved the disagreement. See Fed. R. Crim. P. 32(c)(3)(D). Therefore, we cannot say that, even with respect to these two arrests, the district court relied upon accurate and reliable evidence that the arrests are indicative of a more significant criminal history than reflected by the guidelines. The determination that the arrests indicated similar criminal conduct must be based on facts apart from the arrest record itself and articulated as such by the district court.⁴

⁴ We do not mean by this that the district court must incant a precise formula when discussing prior arrests, see *United States v. Jordan*, 890 F.2d 968, 977 (7th Cir. 1989), but we do expect that the district court will articulate precise reasons for concluding that the arrests are "reliable information."

4. Harmless error

It was error for the district court to consider the prior arrests of the defendant that had not resulted in conviction because the court did not rely upon reliable evidence that the conduct described in those arrest entries was indicative of a more severe criminal history. Nevertheless, vacation of the sentence is not necessarily required. This circuit has adopted the rule that a sentence nevertheless may be upheld if there are proper factors that, standing alone, would justify the departure. *See United States v. Franklin*, 902 F.2d 501, 508-09 (7th Cir. 1990).⁵ Therefore, we shall examine the other factors that the district court considered in deciding to depart upward.

In this case, the district court engaged in a searching inquiry into the entirety of Mr. Williams' past criminal conduct. In addition to considering the convictions more than fifteen years old, the court noted that Mr. Williams previously had been convicted of the same crime—felon in possession of a firearm. This court has acknowledged that a previous conviction on the same charge can support a finding that the criminal history category is inadequate. *United States v. Williams*, 901 F.2d 1394, 1398-99 (7th Cir. 1990); *United States v. Schmude*, 901 F.2d 555, 559 (7th Cir. 1990); *see also United States v. De Luna-Trujillo*, 868 F.2d 122, 124-25 (5th Cir. 1989). Moreover, Mr. Williams' propensity for violent crime was indicated by threats he made to the lives of DEA agents and their families. We conclude that, despite the error noted, the court correctly determined that Mr. Williams' criminality was not reflected properly in the criminal history category and that the relevant evidence justified the rather modest increase in sentence.

⁵ See also *United States v. Rodriguez*, 832 F.2d 1059, 1066-68 (6th Cir. 1989), cert. denied, 110 S. Ct. 1144 (1990). But see *United States v. Zamarripa*, No. 89-2145, 1990 U.S. App. Lexis 9251 at *14 (10th Cir. June 11, 1990); *United States v. Hernandez-Vasquez*, 884 F.2d 1314, 1315-16 (9th Cir. 1989).

C. Ineffective Assistance of Counsel

Mr. Williams argues that he was denied effective assistance of counsel in four respects. He contends that counsel should have 1) challenged the search warrant; 2) challenged the underlying felony conviction; 3) obtained the criminal records of the government witnesses; and 4) substantiated through ownership records the fact that Yates owned the gun.

In order to succeed on a claim of ineffective assistance of counsel, the defendant "must demonstrate that: (1) 'counsel's representation fell below an objective standard of reasonableness' and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir. 1989) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)), cert. denied, 110 S. Ct. 873 (1990). The defendant has the burden of satisfying both prongs of this test. *Shepard v. Lane*, 818 F.2d 615, 619 (7th Cir.), cert. denied, 484 U.S. 929 (1987).

Mr. Williams' appellate counsel relies exclusively on conclusory allegations of ineffectiveness. For example, the entire discussion of the first two asserted grounds is as follows:

In the case at bar Trial Counsel did not challenge the Search Warrant, and did not challenge Williams' prior convictions. Had he successfully challenged either of these 2 points the conviction of the defendant could not be sustained. To convict a defendant of *knowingly receiving a firearm, which had been shipped in interstate commerce, after being convicted of a crime punishable by imprisonment in excess of one year*, the prior conviction must be constitutionally valid.

Appellants Br. at 12-13. The brief does make reference to a document filed by Mr. Williams in the district court that details his assertions of ineffectiveness. Nevertheless, a more plenary discussion by counsel of the allegations in the context of the *Strickland* test is required.

United States District Court SEP 20 1989

WESTERN

District of

WISCONSIN

FILE

JOSEPH W. BY

DATE

NUMBER

UNITED STATES OF AMERICA

V.

JOSEPH N. WILLIAMS

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number 89-CR-47-S

12

No. 89-3084

Neither counsel's conclusory statements in the brief nor Mr. Williams' allegations in his document demonstrate that, *but for* the alleged errors by trial counsel, there is a "reasonable probability" that Mr. Williams would have been acquitted. On the basis of this record, we also are not convinced that trial counsel's performance fell below an objective standard of reasonableness. Mr. Williams presents no argument to explain how challenging the search warrant could have been successful in this case. Counsel is not required to make perfunctory motions with no basis of support in the record. Since appellate counsel suggests no such basis, it is impossible for this court to conclude that trial counsel was unreasonable in not making the motion at trial. *See Strickland*, 466 U.S. at 689 (because of the difficulty of evaluating trial decisions, court should be highly deferential when reviewing charges of deficient performance). We conclude, therefore, that Mr. Williams has failed to meet his burden of demonstrating ineffective assistance of counsel.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—827-90-500

(Name of Defendant)

Thomas D. Baehr

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s)
 was found guilty on count(s) I after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. § 922(g)(1)	Possession of a Firearm by a Convicted Felon	I

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) and is discharged as to such count(s).
 Count(s) _____ (is)(are) dismissed on the motion of the United States.
 The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
 It is ordered that the defendant shall pay to the United States a special assessment of \$ 50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

568-62-2676

Defendant's mailing address:

Rock County Jail

200 Hwy. 14E
Janesville WI 53545

Defendant's residence address:

September 19, 1989

Date of Imposition of Sentence

Signature of Judicial Officer

John C. Shabaz, District Judge
Name & Title of Judicial Officer

September 20, 1989

Date

Defendant: JOSEPH N. WILLIAMS
 Case Number: 89-CR-47-S

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of twenty-seven (27) months, to be followed by a three (3) year term of supervised release. As special conditions of supervised release, it is ordered that the defendant 1) refrain from possession of firearms; 2) register with local law enforcement; 3) refrain from associating with persons who use/possess/distribute drugs, refrain from excessive use of alcohol, and refrain from all illegal drug usage, submit to urinalysis, or other testing to test for drug usage; 4) allow for the search of residence and/or property under his control and allow for seizure of contraband; and 5) share financial information as directed by the supervising U.S. Probation Officer. It is further adjudged that the defendant pay a \$50 criminal assessment penalty which is due and payable immediately to the U.S. Clerk of Court, Western District of Wisconsin. The Court finds that the defendant's financial and employment history indicates the payment of a fine or the cost of incarceration and supervision would unduly depreciate his ability to support himself.

The Court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.
 The defendant shall surrender to the United States Marshal for this district, a.m.
 at _____ p.m. on _____
 as notified by the Marshal.
 The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
 before 2 p.m. on _____
 as notified by the United States Marshal.
 as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

United States Marshal
 By _____
 Deputy Marshal

Defendant: JOSEPH N. WILLIAMS
 Case Number: 89-CR-47-S

Judgment—Page 3 of 6

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years. As special conditions of supervised release it is ordered that the defendant 1) refrain from possession of firearms; 2) register with local law enforcement; 3) refrain from associating with persons who use/possess/distribute drugs, refrain from excessive use of alcohol, and refrain from all illegal drug usage, submit to urinalysis, or other testing to test for drug usage; 4) allow for the search of residence and/or property under his control and allow for seizure of contraband; and 5) share financial information as directed by the supervising U.S. Probation Officer.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: JOSEPH N. WILLIAMS
Case Number: 89-CR-47-S

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

* These conditions are in addition to any other conditions imposed by this Judgment.

15) You shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC §922(g), including any hand gun, rifle or shotgun.

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FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the amount of \$ 50.00, and a special assessment of \$ 50.00.

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

The defendant shall pay a special assessment as to the one-count indictment in the amount of \$50.00

This sum shall be paid Immediately.
 as follows:

To the U.S. Clerk of Court, Western District of Wisconsin.

The Court has determined that the defendant does not have the ability to pay interest. It is ordered that

- The interest requirement is waived.
- The interest requirement is modified as follows:

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RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The Court accepts the guideline calculations as submitted by the Probation Office. It has determined that a departure is warranted based upon reliable information indicating that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. The Court in departing has considered two convictions which were not counted in the criminal history. The convictions for unlawful taking of a motor vehicle and forgery are both felonies and although having occurred in 1966 and 1967, respectively, they nonetheless suggest this defendant's career of criminal activity, unless discouraged, will continue. The Court also has considered the numerous arrests for which the defendant has not been prosecuted. The serious criminal conduct reflected in those arrests, coupled with those convictions not considered in the guidelines, suggest that after a review of all the relevant information this defendant's criminal history is significantly more serious than that of most defendants in the same criminal history category. Accordingly, the Court has added three points to the computation of ten and has determined that this defendant is in Category VI, rather than Category V.

The defendant is a 42-year-old offender with an extensive prior record. This is the second time he has come before the federal court for unlawful possession of a weapon. He has also threatened violence to undercover agents and is capable of violence. In view of his prior extensive criminal record and propensity for further crime and violence, the defendant is sentenced at the top of the guidelines.